in the
Supreme Court
of the
United States

OCTOBER TERM, 1974

NO. 74-4381

ATHENEUM BOOK STORE, INC., a Florida corporation, its officers, employees and agents,

Petitioner,

vs.

CITY OF MIAMI BEACH, a Florida municipal corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

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PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

The Petitioner, ATHENEUM BOOK STORE, INC., prays that this Court will issue its Writ of Certiorari to the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, to review the Final Judgment that Court entered on October 22, 1971, affirming the

Order of the Miami Beach Municipal Court of June 15, 1971, authorizing the seizure of all press materials from Petitioner's book store. The Florida Supreme Court finally denied Certiorari on July 22, 1974.

CITATION TO OPINION BELOW

The Order of the Miami Beach Municipal Court is unreported. The Order is set forth in its entirety in the Appendix hereto (Appendix A). The Final Judgment of the Eleventh Judicial Circuit in and for Dade County, Florida, is unreported. The Final Judgment is set forth in its entirety in the Appendix hereto (Appendix B). Both the Florida Third District Court of Appeals and the Supreme Court, denied Certiorari on March 20, 1972 and May 16, 1974, respectively. The denials of Certiorari are reported at 260 So.2d 909 (3rd DCA 1972); 297 So.2d 26 (1974).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3) because Petitioner has been deprived of its First, Fourth, Fifth, Sixth, and Fourteenth Amendment rights by virtue of the Order, Judgment and opinions of the Miami Beach Municipal Court, the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida; the District Court of Appeal, Third District of Florida, and the Florida Supreme Court.

The decision on which review is sought, was rendered by the lowest Appellate Court of the State. All Appellate remedies of the State Courts have been exhausted as to the questions presented herein in that timely petitions for

Writ of Certiorari have been filed and denied by both the Florida Third District Court of Appeals and the Florida Supreme Court (Appendix C). The Florida Supreme Court denied Petitioner's timely Petition for Rehearing of that Court's denial of Petition for Writ of Certiorari on July 22, 1974 (Appendix D).

QUESTIONS PRESENTED

1. Whether Petitioner has been denied its First, Fourth, Fifth, Sixth and Fourteenth Amendment rights where a Municipal Court Judge, without statutory or any other legal authority, orders the mass seizure and confiscation of over 3,500 different books and magazines from Petitioner's book store after a cursory thirteen minute examination of only a few of the materials seized?

2. Whether Petitioner's Fourteenth Amendment right to due process of law has been violated where, having granted Petitioner book store leave to file an expedited Appeal from the Municipal Judge's Order authorizing the seizure of all presumptively protected press materials from Petitioner's store, and where, after having filed and perfected said expedited Appeal, and during the pendency of said Appellate proceedings, the Municipal Judge ordered the actual, physical seizure of said materials, thus effectively denying Petitioner its constitutionally guaranteed right to engage in the sale of presumptively protected materials?

3. Whether Petitioner's First and Fourteenth Amendment rights have been violated by the Municipal Court's determination based on a thirteen minute view of the Petitioner's premises, that a mass seizure was justi-

fied because Petitioner had engaged in "pandering," in the absence of any evidence, testimony or proof of "pandering"?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following provisions and statutes are set forth in their entirety in the Appendix hereto:

Amendments to the United States Constitution:

First
Fourth
Fifth
Sixth
Fourteenth (Appendix E)

Florida Statute 847.011(8)(a) and (b) (Appendix F)

Code of the City of Miami Beach, Florida Charter, Section 14 (Appendix G)

Florida Constitution, Article I, Section 4, Freedom of Speech and Press (Appendix H)

STATEMENT OF THE CASE

On May 20, 1971, after viewing several magazines obtained from Petitioner's store, the Honorable Nelan Sweet, Miami Beach Municipal Court Judge, ordered the Petitioner to engage in what was ironically termed "an Adversary Hearing" allegedly to determine the obscenity

vel non of the materials located at said store (Appendix I). Petitioner sought a Writ of Prohibition from both the Dade County Circuit Court (sitting in its Appellate capacity), and the Florida Third District Court of Appeals[1]. These were denied. While Petitioner's Appeals from the denial of the Petition for Writ of Certiorari were pending, the Miami Beach Municipal Judge issued another Order on June 9, 1971, directing Petitioner to engage in the "Adversary Hearing" (Appendix J). The "Hearing" was held on June 15, 1971, at which time, after a thirteen minute examination of only a few of the more than 3,500 different publications involved[2], the Judge Ordered, ex parte, the seizure of all the materials in the store located at 1668 Collins Avenue, Miami Beach, Florida (Appendix A-3&4).[3] The Municipal Court Stayed execution of the Order and permitted Petitioner 10 days in which to appeal (Appendix A-4). Petitioner filed its Notice of Appeal on June 18, 1971 (Appendix K). Petitioner was notified on July 1, 1971, that the actual seizure was to occur on July 6, 1971, at 7:00 O'Clock P.M. (Appendix L). A Motion to Set Aside the Seizure Order was filed but denied July 6, 1971, (Appendix M). An emergency Motion for Constitutional Stay Writ or in the Alternative, Petition for Writ of Certiorari was filed on July 6, 1971, in the Florida Third District Court of Appeals but was denied (Appen-

[1]Prior thereto, Petitioner removed the proceedings to Federal Court but upon that Court's remand, sought unsuccessfully to obtain relief in the State Judicial System.

[2]At the Hearing, the Municipal Judge did not offer Petitioner the opportunity to present any evidence; Petitioner was not offered an opportunity to examine its accusers because, in fact, no witnesses were called against Petitioner.

[3]The materials in question consisted of thousands of magazines, paper backs, pocket books, 8mm films, and other press materials which were seized without ever being viewed by the Judge.

dix N). The materials were seized, despite the fact that the Appeal, taken to the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, was pending. On October 22, 1971, the Circuit Court affirmed the Municipal Court (Appendix B). A Petition for Rehearing was denied (Appendix B). Petitioner then filed a Petition for Writ of Certiorari in the Third District Court of Appeal which was denied on March 20, 1972, 260 So.2d 909 (3rd D.C.A. 1972). Petitioner next sought a Petition for Writ of Certiorari in the Supreme Court of Florida which was ultimately denied, **almost two years after being filed,** 297 So.2d 26 (1974). Petitioner seeks the present Writ from the denial of its Petition for Rehearing entered July 22, 1974, by the Florida Supreme Court.

No criminal charges have ever been filed against Petitioner as a result of the seizure.

REASONS FOR GRANTING THE WRIT

1. The Municipal Court Judge has unilaterally assumed the role of censor, vitiated the doctrine of the separation of powers, violated the fundamental intent of the Constitution, and ignored the mandates of this Court, in suppressing, seizing, and ordering presumptively protected literature destroyed without trial or hearing. The instant seizure of over 3,500 books and magazines was perpetrated, not by a neutral, detached Magistrate, but by a Municipal Judge who despite lacking statutory authority, viewed only a minute sample of the materials he ordered confiscated. In essence, the procedures employed sub judice operated to bar Petitioner from engaging in a presumptively protected business without the benefit of **any** judicial scrutiny to determine the obscenity

vel non of the materials prohibited in futuro, contrary to the First and Fourteenth Amendments to the United States Constitution. Clearly, a procedure that sweeps so broadly and with so little discrimination is constitutionally defective and violates the techniques required by the Due Process Clause to prevent erosion of constitutional guarantees. **Marcus v. Search Warrants of Property**, 367 U.S. 717 (1961).

This Court has established the general rule that a mass seizure of press material is unlawful in the absence of a prior judicial superintended adversary hearing which **focuses searchingly on the issue of the obscenity vel non of the materials** in question, **Marcus v. Search Warrants of Property**, supra; **A Quantity of Books v. State of Kansas**, 378 U.S. 205 (1964).

Most decisions emphasize that a mass seizure would most likely result in the suppression of constitutionally protected material to which the public has a right, **United States v. Alexander**, 428 F.2d 1169, 1172 (8th Cir. 1970); **Overstock Book Co. v. Barry**, 305 F.Supp. 842, 853 (E.D. N.Y. 1969), aff'd. 436 F.2d 1289 (2d Cir. 1970). Other Courts have based their decisions on the financial burden placed upon the seller as a result of the indiscriminate mass seizure and the interference with property rights. **Sokolic v. Ryan**, 304 F.Supp. 213 (S.D.Ga. 1969); **Gregory v. DiFloria**, 298 F.Supp. 1360, 1364 (W.D.N.Y. 1969).

In **Heller v. New York**, ——U.S.——, 93 S.Ct. 37 L.Ed.2d 745 (1973), this Court, relying on its prior decisions in **United States v. Thirty-Seven Photographs**, 402 U.S. 363 (1971), and **Freedman v. Maryland**, 380 U.S. 51 (1965), reiterated its holding that "because only a

judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint," at 752. In the case at bar, the Hearing which was held, in reality constituted nothing more than an ex parte determination, sight unseen, that **all the literature** in Petitioner's store was obscene as a matter of law. Petitioner was permitted a Hearing in name only, where not even the obscenity of allegedly "representative"[4] magazines selected by the Judge was put in "focus." None of the materials viewed were made part of the record or identified. The utilization of such an insensitive procedure clearly falls far short of constituting the prerequisite independent, neutral, judicial determination of the obscenity issue prior to seizure, **Speiser v. Randall**, 357 U.S. 513 (1968). The overzealous issuing Magistrate improperly served merely as a "rubber stamp for the police," **Aguilar v. Texas**, 378 U.S. 108 (1964).

The very title, "adversary hearing" conveys the impression that two opposing viewpoints will be heard. However, in the case at bar, neither side spoke, and only the Judge "testified." The mechanics of an adversary hearing have been discussed in precious few cases, but in **Milonas v. Schwalb**, 319 N.Y.S. 2d 327, 337 (1971), that Court set forth the following guidelines for an adversary hearing:

> Essential to any fair procedure would be (1) full notice to the property owner and other per-

[4]At no time did Petitioner stipulate that the few magazines actually viewed by the Judge were in any way representative of the entire stock of Petitioner's book store which was seized.

> sons most directly interested (2) an opportunity to answer, defend, and participate (3) an opportunity freely to present all relevant evidence (4) the burden of proof to justify the seizure being placed on the government (5) the right to a speedy and direct final determination before the . . . (material) is seized or withdrawn from circulation (6) the opportunity for immediate appeal on the central issue (7) and of course, a determination made in an inquisitorial setting **so that the accuser is not the Judge,** at 337. (Emphasis added)

Of these seven factors which the Court felt would guarantee a fair procedure, only the first, notification to interested parties, was fulfilled instanter. The Petitioner was not afforded an opportunity to defend, answer or reply. No evidence whatsoever was adduced by the City of Miami Beach so, clearly, the City failed to meet its burden of proof. The Sixth Amendment to the United States Constitution requires the accuser to confront the accused. This was not done. There was no swift appellate remedy. And, finally, there were no witnesses called by Respondent for Petitioner to examine, but only the viewing Judge's conclusory statements which Petitioner could not cross-examine. This procedure clearly contravenes the First, Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

In **Heller v. New York,** supra, this Court also discussed at great length, its prior holdings in **A Quantity of Copies of Books v. Kansas,** supra, and **Marcus v. Search Warrants of Property,** supra, and the distinction between searches aimed at acquiring and preserving evidence and

those which are essentially **censorial** in nature, as here. This Court said, of **Quantity**, supra, and **Marcus**, supra:

> Those cases concerned the seizure of large quantities of books for the sole purpose of their destruction, and this Court held, that, in those circumstances, a prior judicial determination of obscenity in an adversary proceeding was required to avoid "danger of abridgement of the right of the public in a free society to unobstructed circulation of non-obscene books," **Heller**, at 753.

This Court went on to say:

> We do not disturb this holding. Courts will scrutinize any large-scale seizure of books, films, or other materials presumptively protected under the First Amendment to be certain that the requirements of **Quantity of Copies of Books** and **Marcus** are fully met. "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." (Citations omitted) **Heller**, at 754.

The procedure followed instanter was almost identical to that followed in **A Quantity of Books v. State of Kansas**, supra, where a mass seizure of 1,175 copies of books and magazines was based upon a forty-five minute ex-parte judicial determination of obscenity of several "representative books." This Court, in reversing that procedure, stated:

> We conclude that the procedure followed in issuing the warrant for the seizure of the books and authorizing their impounding pending hearing was constitutionally insufficient because it did not adequately safeguard against the suppression of non-obscene books. **Books**, at 208.

This Court further stated in **A Quantity of Books**, supra, that "State regulation of obscenity must conform to procedures that will insure against the curtailment of constitutionally protected expression, which is often separated from obscenity by only a dim and uncertain line. **Bantam Books, Inc. v. Sullivan**, 372 U.S. 58, 66, 83 S.Ct. 631, 637, 9 L.Ed.2d 584." The Constitution requires a procedure "designed to focus searchingly on the question of obscenity," **Marcus**, 732. This is because "if a seizure of books precedes an adversary determination of their obscenity, there is danger of abridgement of the public in a free society to unobstructed circulation of non-obscene books." **Bantam Books v. Sullivan**, supra, **Smith v. California**, 361 U.S. 147 (1959), **Roth v. United States**, 354 U.S. 476 (1957), **Marcus v. Search Warrant**, supra.

Similarly, in **Marcus v. Search Warrants of Property**, supra, this Court held that the "State's power to suppress obscenity is limited by constitutional protections for free expression," a 730. Adopting the reasoning of **Smith v. People of the State of California**, supra, this Court stated:

> The existence of the State's power to prevent the distribution of obscene matter does not mean that there can be no constitutional barrier to any form of practical exercise of that power, inasmuch as our holding in **Roth** does not recog-

> nize any State power to restrict the dissemination of books which are not obscene. **Marcus,** at 730.

Where freedom of speech is involved, due process requires that the party who seeks to limit speech bear the heavy burden of proving that said speech is without protection. **Speiser v. Randall,** 357 U.S. 513 (1968); **Bantam Books, Inc. v. Sullivan,** supra. In **New York Times-Washington Post v. U.S. (Pentagon Papers),** 403 U.S. 713 (1971), this Court held:

> Any system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity. **Bantam Books, Inc. v. Sullivan,** supra . . . **Near v. Minnesota, ex rel., Olson** . . . The Government thus carries a heavy burden of showing justification for the imposition of such a restraint. At 714.

This Court further noted, in **Freedman v. Maryland,** supra:

> . . . we hold that a non-criminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorial system. First the burden of proving the film is unprotected expression must rest on the censor. At 58.

Further, even if the Hearing conducted in the case at bar were to pass constitutional muster despite **Marcus,**

supra, and **A Quantity of Books,** supra, the Municipal Court was without any authority whatsoever to order the instant mass seizure of press materials. The Code of the City of Miami Beach, Florida, Charter, §4, set forth in Appendix G, does not confer any such power upon the Municipal Judge. The authority to hold an adversary hearing or impose any type of prior restraint, is not granted to a Miami Beach Municipal Judge, nor is such power necessary for, or ancillary to, the performance of his other duties, as set forth in The City of Miami Beach Charter (Appendix G). In general, the jurisdiction of the Municipal Court is limited to the punishment of offenses against municipal ordinances. This limitation was once expressly stated in Florida Constitution Article V, §34 (now merged generally into Florida Constitution Article V, §1), (Appendix H). Although no express specific limitation is now placed on municipal courts by the Florida Legislature, the City Charter of Miami Beach, which sets the powers and duties of the municipal court, has seen fit to limit the actual powers of that court thusly:

> From this it follows the only jurisdiction a municipal court may have, must emanate from an ordinance passed by its municipality. **Fla. Atty's Gen. Biennial Rep.,** 054-209 (1953-54).[5]

The Florida Legislature, in enacting F.S. §847.011(8)(a) and (b)(Appendix F), grants the power of enjoining threatened violations of the State Obscenity Statute solely **upon the Circuit Court and none other.** §847.011(8)(a) and (b) refer specifically to a **judge of the Circuit**

[5]City of Miami Beach Ordinance No. 1789 which amended and created Subchapter 25-5½A, dealing with regulations on obscenity, does not grant any additional power to the municipal court or its judges.

Court in whom jurisdiction is vested to "grant an order restraining the person complained of until final hearing or further order of the Court." Nowhere in F.S. §847.011, nor anywhere else can authority be found for delegating injunctive responsibility to a municipal court. The reason for such is clear. A prior restraint in the area of First Amendment freedoms involves "a question of constitutional judgment of the most sensitive kind," **Roth v. United States**, supra. This requires a determination by a court of general jurisdiction, such as the Circuit Court, and not a Municipal Court, whose powers are solely limited to enforcement of its own ordinances to the extent such ordinances are not inconsistent with state statutes.

It is therefore clear that a mass seizure of presumptively protected First Amendment materials is unconstitutional, absent a determination that each article is obscene as a matter of law, at a **true** adversary hearing, conducted by a judicial officer vested with the authority to make such a determination. The procedure is otherwise deficient and the seizure unlawful because the United States Constitution, as construed by this Court, guarantees at least these rights in order to preserve Freedom of Speech.[6]

2. It is fundamental under the Fourteenth Amendment Due Process Clause that all authority of a lower court terminates when an appeal from that court is perfected, and no further proceedings may be instituted

[6]Petitioner contends that whether this Court has previously held that a judicially supervised adversary hearing is not a constitutional prerequisite to a mass seizure, is of no moment sub judice, because where, as here, the City of Miami Beach sought to employ that procedure, it was bound by the Fourteenth Amendment Due Process of Law Clause to follow the procedure it sought to utilize.

by that court concerning the subject matter of the appeal. **Heitmuller v. Stokes,** 256 U.S. 359 (1921); **The Charles D. Leffler,** 100 F.2d 759 (3rd Cir. 1938); **Roberts v. Metropolitan Life Ins. Co.,** 94 F.2d 277 (7th Cir. 1938), certiorari denied 303 U.S. 660, 58 S.Ct. 764, 82 L.Ed. 1119. As this Court held in **Newton v. Consolidated Gas Co. of New York,** 258 U.S. 165 (1922):

> One general rule in all cases (subject, however, to some qualifications) is that an appeal suspends the power of the court below to proceed further in the cause. Undoubtedly, after appeal the trial court may, if the purposes of justice require, preserve the status quo until decision by the appellate court. (Citations omitted). But **it may not finally adjudicate substantial rights directly involved in the appeal. Merrimack River Savings Bank v. Clay Center,** 219 U.S. 527, 534, 31 Sup.Ct. 295, 55 L.Ed. 320, Ann. Cas. 1912A, 513. At 177. [Emphasis added]

Thus, the general rule is that where an appeal has been taken the effect of which is to transfer jurisdiction of the cause to the appellate court, the court from which appeal is taken can proceed no further with respect to the subject matter of the appeal until the appeal has been disposed of. **In re Allen,** 115 F.2d 936, 939 (Ct. of Cust. and Pat. App. 1941). 4 C.J.S., **Appeal and Error,** §607, states the rule as follows:

> The perfection of the appellate proceedings, and consequent transfer of jurisdiction vests the appellate court, with exclusive power over the subject matter of the proceeding, and suspends the

power of the lower court with reference thereto, although it retains power to do anything necessary to the preservation of the case in the appellate court.

The same constitutional right to appeal is provided by Florida law. **Thursby v. Stewart,** 103 Fla. 990, 38 So. 742 (1931); **Sunrise Beach, Inc. v. R. S. Phillips,** 181 So.2d 169 (Fla.2nd DCA 1965); **Seigel v. Solomon,** 201 So.2d 501 (Fla. 3rd DCA 1967). Moreover, a supersedeas bond is not essential to the acquisition or the preservation of appellate jurisdiction. **Thursby v. Stewart,** supra; **Willey v. W. J. Haggsan Corp.,** 89 Fla .446, 105 So. 126 (1925).

At the "adversary hearing" held on June 15, 1971, the presiding Municipal Judge, after spending thirteen minutes looking at a few magazines, ordered the seizure of 3,500 publications. At that time the Judge gave the Petitioner 10 days within which "to appeal this without actually carting this [i.e. 3,500 books] all away," (Appendix A-4). Notice of Appeal was filed on June 18, 1971, and jurisdiction of the cause was then transferred to the Appellate Court (i.e., The Circuit Court, Eleventh Judicial Circuit, in and for Dade County, Florida, acting in its Appellate capacity).[7] Consequently, the Municipal Court could no longer proceed in this cause. **Newton v. Consolidated Gas Co. of New York,** supra, **Sandler v. Gragg,** 123 F.2d 114 (10th Cir. 1943), certiorari denied 318 U.S. 785, 63 S.Ct. 983, 87 L.Ed. 1153. Thus, the seizure order of July 1, 1971 was void and of no effect. To permit the operation of the seizure Order, originally Stayed

[7]The Florida Appellate procedure vests Appellate jurisdiction in the Circuit Court of the County in which a Municipal Court is located to review the final orders and judgments of that Municipal Court.

pending Appeal, would constitute an intolerable denial not only of Petitioner's right to Due Process of Law under the Fourteenth Amendment, but would also deny it the right to rely upon an explicit judicial order expressly permitting appeal.

3. The Municipal Court erroneously ordered the instant seizure on the basis of what it considered to be "representative" magazines. The Court also improperly included the concept of "pandering" to rationalize the seizure of those publications which it acknowledged may not have been obscene:

> Though the Court finds the store does contain materials which under present decisions may not constitute pornography or obscenity, based upon the obvious pandering both to heterosexual and homosexual individuals, and based upon the obvious fact that all the materials situated in the premises of the Atheneum Book Store at 1668 Collins Avenue, Miami Beach, Florida, deal with sexual activity of some sort, and based upon the covers of the magazines and publications and the prices, etc., and the fact that the store represents itself to be an adult book store, it is clear that the owners and or operators of the Atheneum Book Store are pandering (Appendix A-3).

This Court has defined the term "pandering" as "the business of purveying sexual or graphic matter openly advertised to appeal to the erotic interest of their customers," **Roth v. United States**, 354 U.S. 476, 495-496 (1957), and reiterated this definition in **Ginzberg v. United States**, 383 U.S. 463 (1965). As applied by this

Court, the term includes the **method** used to promote or procure buyers of material by catering to the immature or abnormal and appealing to those persons' erotic desires or prurient interest.

The **Ginzberg** decision clearly demonstrates that the Petitioner in the case at bar was not pandering. This Court, in **Ginzberg,** based its decision, after reviewing expert testimony, on the fact that the defendant sought mailing privileges from "Blue Ball" and "Intercourse," Pennsylvania; that Ginzberg's advertising stressed the fact that he was taking advantage of liberal obscenity laws; that there was indiscriminate solicitation to unwilling recipients; and, finally, to increase speculation as to the nature of the material, the defendant guaranteed the refund of purchase money if the Post Office refused to permit the books to go through the mails. All of these involved promotion by a "hard sell" method to more than normally sexually interested adults. Thus, the defendant's choice of audience and the means which he employs to reach that audience become extremely important.

Sub judice, the Petitioner employed no form of promotion in its sale operation nor did it characterize its materials as obscene. The magazines and books were simply displayed on racks and counters. There were no advertisements stressing their sexuality nor emphasis placed on any portion of them. Furthermore, the trial Court did not base its decision on any evidence that showed said books and magazines were specifically conceived and marketed for sexually deviant groups, c.f. **Mishkin v. State of New York,** 383 U.S. 502 (1966), or

that generally these publications were not being sold to those with normal sexual curiosity.

It should further be noted that this Court specifically limited the pandering test to "close cases":

> We perceive no threat to First Amendment guarantees in thus holding that **in close cases evidence of pandering may be probative** with respect to the nature of the material in question and thus satisfy the **Roth** test, **Ginzberg**, at 474. [Emphasis added]

The trial Court not only failed to limit its use of pandering to "close cases," but it also permitted constitutionally protected material to be condemned as obscene through the use of an inappropriate and unconstitutional application of the pandering concept.

The lower Court relied heavily upon the misconception that because Petitioner is an "adult" book store, pandering must, therefore, exist. This Court, however, has consistently dispelled such a conclusion:

> No weight is ascribed to the fact that petitioners have profited from the sale of publications which we have assumed, but do not hold, cannot themselves be adjudged obscene in the abstract; to sanction consideration of this fact might indeed induce self-censorship, and offend the frequently stated principle that **commercial activity in itself is no justification of narrowing the protection of expression secured by the First Amendment. Ginzberg**, at 474. [Emphasis added]

Res ipsa loquitur has no place in the area of the First Amendment. Thus, "it is of no course nor matter that the dissemination takes place under commercial auspices," **Smith v. People of California,** at 150, supra, and to hold otherwise " . . . would be to shackle the First Amendment in its attempt to secure the widest possible dissemination of information from diverse and antagonistic sources." **New York Times, Inc. v. Sullivan,** 376 U.S. 254, 266 (1969).

The Trial Court's reliance upon the price of the publications to establish pandering is similarly misplaced. The fact that the materials sold at what might appear to be high prices may lead to the inference of knowledge of the character of the material, **Mishkin v. State of New York,** 383 U.S. 502 (1966), but has absolutely no impact upon the issue of pandering. **Ginzberg,** supra.

The trial Court also found the covers of the allegedly obscene books to be indicative of pandering. This too, was a misapplication of the law. As the Court held in **People v. Buckley,** 320 N.Y.S.2d 91 (1971):

> The Court is persuaded that no element of pandering is involved in the sale and distribution of these magazines such as was condemned in **Ginzberg.** . . . These magazines whose covers boldly appeal to sex, are openly displayed for sale and may be freely purchased. **This in and of itself does not constitute "pandering"** within the purview of **Ginzberg.** See Redrup. . . [Emphasis added]

This Court has for many years held that the adult population of the United States is not limited in available reading matter only to that material that is fit for consumption by children, **Butler v. Michigan,** 352 U.S. 380 (1957). Sex and obscenity are not synonymous, **Roth v. United States,** supra, yet, the lower Court's concept of pandering is based upon precisely such a constitutionally infirm presumption and thus must fall. C.f. **Leary v. United States,** 395 U.S. 6 (1969).

CONCLUSION

Petitioner, ATHENEUM BOOK STORE INC., respectfully requests this Honorable Court to grant the Petition for Writ of Certiorari to the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, and reverse the Judgment of that Court and the Order of the Miami Beach Municipal Court, Miami Beach, Florida, authorizing the mass seizure of presumptively protected press materials.

Respectfully submitted,

JOEL HIRSCHHORN, P.A.
Attorney for Petitioner
1040 City National Bank Bldg.
25 West Flagler Street
Miami, Florida 33130

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petition for Writ of Certiorari to the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, was mailed this ____day of October, 1974, to the City Attorney for the City of Miami Beach, 1130 Washington Avenue, Miami Beach, Florida 33139.

JOEL HIRSCHHORN, P.A.

APPENDIX

APPENDIX "A"

IN THE MUNICIPAL COURT IN AND FOR
MIAMI BEACH, FLORIDA

CITY OF MIAMI BEACH,

Plaintiff,

vs.

THE ATHENEUM, INC.,

Defendant.

1668 Collins Avenue,
Miami Beach, Florida
Tuesday, 10:45 a.m.,
June 15, 1971.

The above-entitled cause came on for an adversary hearing before The Honorable Nelan Sweet, Municipal Judge, pursuant to notice.

APPEARANCES:

JOSEPH A. WANICK, City Attorney, by
LIONEL BARNET and
PHILIP AUERBACH, Assistant City Attorneys.

JOEL HIRSCHHORN, Esq.,
Attorney for Defendant.

ALSO PRESENT:

SERGEANT DAVE RICHARDS
LIEUTENANT FRED WOOLDRIDGE
CAPTAIN SISTRUNK

MR. HIRSCHHORN: Your Honor, for the record, we would respectfully object to these proceedings on the grounds that it is our feeling that this proceeding exceeds your jurisdictional authority, and our petition for writ of prohibition, which we filed in Judge Herin's division, has since been noticed for appeal, and his refusal to issue the writ of prohibition has been assigned as error. Our interpretation of your powers limits you as a municipal judge, and this adversary hearing goes beyond the scope of your powers.

Also, Your Honor, I would like the record to reflect the appearance of everyone.

THE COURT: Their appearances will be noted and your objection will be noted, for the record, and denied.

MR. HIRSCHHORN: For the record, I object to the taking of photographs in view of the fact this is a courtroom, has been convened as a courtroom, and note the absence of a clerk.

Further objection is taken as to photographs on the ground it would violate the defendant's Fifth Amendment privilege against self-incrimination.

THE COURT: Your objections will be noted and denied.

[Off the record]

MR. HIRSCHHORN: Note the time is ten-fifty-eight.

THE COURT: The Court having examined representative magazines and other publications, and the Court having noted that a number of these publications, magazines, contain what, in the opinion of the Court, based upon previous judicial decisions, constitute hard core pornography in that there are pictorial representations of fellatio and cunnilingus and other examples of sexual activity, including actual intercourse.

Though the Court finds the store does contain materials which, under present decisions, may not constitute pornography or obscenity, based upon the obvious pandering both to heterosexual and homosexual individuals, and based upon the obvious fact that all of the material situated in the premises of The Atheneum Bookstore at 1668 Collins Avenue, Miami Beach, Florida deal with sexual activity of some sort, and based upon the covers of the magazines and publications and the prices, et cetera, and the fact that the store represents itself to be an adult book store, it is clear to the Court that the owners and or operators of The Atheneum Bookstore are pandering.

It is, therefore, the Court's order that all of the material located in the store be seized.

I am going to give you an opportunity to appeal this without actually carting this all away.

MR. HIRSCHHORN: I appreciate that, Judge.

THE COURT: It is further ordered by the Court that the defendants shall have— How much time do you need?

MR. HIRSCHHORN: Ten days.

THE COURT: Ten days—

MR. HIRSCHHORN: I will prepare the notice of appeal tomorrow.

THE COURT: —in which to proceed with the appeal of the Court's order ordering all of the material in The Atheneum Bookstore to be seized.

Is there anything further?

MR. HIRSCHHORN: May we stipulate to shorten the time for preparation of the record on appeal?

THE COURT: Definitely. I want this decided as quickly as possible so we know whether or not we are operating in the proper fashion.

As I pointed out, there are certain materials, based upon recent Supreme Court decisions, that would not be considered pornographic or obscene by themselves but, as I previously stated, it is the Court's opinion, based upon the pandering concept and in other cases, that this Court has not only the right but the duty to order all the material seized.

If you want to stipulate to shorten the time for the proceedings—

MR. BARNET: The City would have no objection and gladly stipulates that the period for appeal be reduced to the minimum necessary time.

MR. HIRSCHHORN: There is no record, really, because I will file my notice of appeal tomorrow and assignments of error and designations to the court reporter and directions to the clerk by Thursday. Then it will just be a minimum number of days in which to write our briefs.

THE COURT: The only record, other than my order, my findings, would be—I imagine the City would want to introduce the photographs taken by Lieutenant Wooldridge.

MR. HIRSCHHORN: You have already ruled they can take them. So, if Mr. Barnet designates that to the clerk, they will go in.

THE COURT: I want—

MR. HIRSCHHORN: The record will consist of the affidavit referred to in your original order, your order, this transcript and whatever else you—

THE COURT: I would like the pictures of the store itself and those individual pictures of individual magazines that you have taken to be also made part of the record so the appellate court will have before it basically the same things I had.

MR. HIRSCHHORN: To which we object.

MR. BARNET: It is the City's position that this Court has jurisdiction to order the immediate seizure of all materials in the store in order to be held until such time when the Municipal Court in and for the City of Miami Beach shall hold a hearing or a trial on this cause.

However, in view of the fact the Municipal Court Judge has at this time ordered the seizure, but also entered a stay of execution for a period of ten days in which the appeal shall lie, the City would respectfully request that a photographic record be made of the magazines in the store at this time so that at least for purposes of retention we would have on record a photographic record of those magazines as they appeared in the store at the time of this adversary proceeding.

So, I would respectfully request that the police officer accompanying the Court at this time, who has a camera with him, systematically photograph each section of the walls in this store, one after another, and they can be identified at a later date.

I think that it would be a tremendous task if, on the other hand, this was not permitted. In that regard it would be necessary to make a written inventory record of the magazines by name and other titles and other identifying matter.

MR. HIRSCHHORN: Your Honor, for the purpose of preserving the inventory, this is the most expeditious way for doing it.

THE COURT: I am trying to make it easier.

MR. HIRSCHHORN: I appreciate it and my clients appreciate it.

THE COURT: I would also suggest a picture of the front of the store be taken to complete the entire record.

Anything further?

MR. HIRSCHHORN: Is the picture of the front of the store going to be part of this record?

THE COURT: I would suggest that it be.

MR. HIRSCHHORN: Thank you, Judge.

[Whereupon, Judge Sweet left the premises and, at 11:30 a.m., the following proceedings were had:]

MR. BARNET: The Municipal Judge has departed following his entry of the order of seizure and ten days stay of execution pending the appeal of this cause by the defendant.

The City at this point seeks to have the record show that in accordance with the stipulation of the defendant with respect to an inventory of the premises of the bookstore, a total of sixteen Polaroid photographs of the interior of the store have been taken. Each of those photographs were developed and the prints are now on view in the store where counsel for the defendant has an opportunity to observe and view them.

It is the City's contention these do accurately portray the interior of the store, the magazines that are displayed on the racks in the store.

In addition, six other Polaroid photographs were taken prior to the departure of the Municipal Judge and prior to the entry of his order.

These photographs were taken over the objection of counsel for the defendant, the Municipal Judge having overruled counsel's objection to the taking of these photographs.

The six photographs have also been developed and the prints are here available to counsel for the defendant to view at this time.

These photographs also portray portions of the interior of the premises of this bookstore, in addition to showing several of the individuals who are here in the bookstore at this time including the Municipal Court Judge.

MR. HIRSCHHORN: I would like to state for the record that I estimate approximately fourteen hundred books were on the premises of The Atheneum, Inc. during this hearing.

MR. BARNET: The City does not have any reason to disbelieve the statement of counsel for the defendant as to the approximate estimated total of books on the premises at this time. However, for the record, it should be noted that whatever number of total books are here they do represent a total of different publications since

many of the publications are duplicated so that in some instances there are four or five or more copies of the same publication.

I do not know what an estimated total of the actual different number of publications would be. Do you?

MR. HIRSCHHORN: No. For the purposes of the record, can we agree that my estimate of fourteen hundred books would be the estimate we use for the purpose of appeal, not individual titles, but the total number of books?

MR. BARNET: I will agree to fourteen hundred as a total number since it is an estimate and we have no way of disproving it. It seems fairly accurate.

It is my understanding that counsel is also going to stipulate that these same publications, for the most part, will remain in these premises until such time as the period set by the Municipal Judge as a stay of execution of his previously entered seizure order will occur.

MR. HIRSCHHORN: I will stipulate that we are going to remain open for business—unless closed by court order—and we will not remove any books, except the numbered sales, and that our stock in trade will not be less than what we have here.

Further, in the event of an affirmance of the Court's orders, and we are required to produce copies pursuant to the seizure order by Judge Sweet, we will produce as many copies of each item as would appear to be reflected in these photographs. My estimate is based on a minimum

of two in number. In some cases we have one and in some cases we have three or four.

MR. BARNET: It is my understanding that the Municipal Judge's order of seizure applied to all the publications in the store at this time.

In view of that, and at such time as the stay of execution runs and in the event of an affirmance of the Municipal Judge's order, then it is my understanding that you will produce essentially all the books that are presently in the premises on this date—

MR. HIRSCHHORN: Correct.

MR. BARNET: —pursuant to the order of seizure?

MR. HIRSCHHORN: Such as we are able to.

One more thing. I think the record will accurately reflect that the Judge spent approximately thirteen minutes, from ten forty-five to ten fifty-eight, perusing books, picking an occasional book at random off the shelves, looking through it and then making his order; is that correct?

MR. BARNET: I cannot make that statement. I am sure that whatever the record will show as to the amount of time, if any, the Municipal Judge spent, then, of course, the record itself is the best evidence of whatever time was involved.

MR. HIRSCHHORN: The record is clear on the time, but if my observation of what the Judge did is erroneous, please correct me.

MR. BARNET: I cannot state for certain what amount of time, but I do recall the Judge spent some amount of time perusing the books and magazines prior to the time he entered the order. Whatever time the record shows will be the time.

MR. HIRSCHHORN: It was at random. He did not look at each and every book.

MR. BARNET: I observed the Municipal Judge walk throughout the store and examine various publications on several of the racks in the store. I did not actually observe him throughout the entire time he was in the store, so I cannot really state what, if anything, he looked at specifically.

MR. HIRSCHHORN: Okay. Thank you.

[Whereupon, the hearing was concluded at 11:40 a.m.]

CERTIFICATE

STATE OF FLORIDA)
)
COUNTY OF DADE)

I, Herbert Grapes, CSR, a Notary Public in and for the State of Florida at Large, do hereby certify that pursuant to notice, the case of City of Miami Beach versus The Atheneum, Inc., came on for adversary hearing before The Honorable Nelan Sweet, Municipal Judge, on June 15, 1971; that I was authorized to and did report said proceedings, and that the foregoing pages, numbered

1 to and including 13, contain and are a true and correct shorthand report of the proceedings of said hearing.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my seal this 17th day of June, 1971.

/s/ Herbert Grapes

CERTIFICATE OF CLERK

STATE OF FLORIDA)
) ss
COUNTY OF DADE)

I, Ruth B. Rouleau, Clerk of the Municipal Court of the City of Miami Beach, Dade County, Florida, do hereby certify that the foregoing pages 1 to 22 inclusive contain a correct copy of the judgment in the Case of the City of Miami Beach vs. Atheneum Book Store, Inc., and a true and correct recital and inclusion of all such papers and proceedings in said cause as appear from the records and files in my office that have been directed to be included in said record by the Directions that were furnished me.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Court this 19 day of July, 1971.

Ruth B. Rouleau
Clerk of the Municipal Court of
City of Miami Beach
Dade County, Florida

By: (signature unreadable)
Deputy Clerk

APPENDIX "B"

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA
CRIM. APPEAL NO. 7632 (Testa)

ATHENEUM BOOK STORE, INC.,
a Florida corporation,
its officers, employees and agents,

Appellants,

v.

CITY OF MIAMI BEACH,
a Florida municipal corporation,

Appellee.

ORDER

THIS IS AN APPEAL from an Order of a Municipal Court, in and for the City of Miami Beach, wherein the Judge ordered the seizure of approximately 3500 magazines which had been located on the premises of a bookstore.

The Court has carefully reviewed the transcript of testimony, the exhibits, the briefs of counsel and considered the oral argument of counsel for the respective parties.

The Court finds that in fact a judicially superintended prior adversary hearing was held pursuant to the Order of the Municipal Court and for which Order there was proper notice and service. The Court further finds

the Order of Seizure to have been properly entered by the Court below, which Order is therefore affirmed.

DONE AND ORDERED at Miami, Dade County, Florida, this 22 day of October, 1971.

/s/ Thomas A. Testa

Judge, Circuit Court

[TITLE OMITTED]

ORDER

This cause having come on to be heard before me upon Appellant's Petition for Rehearing, and the Court having heard argument of counsel and being otherwise fully informed in the premises, it is thereupon

ORDERED AND ADJUDGED that Appellant's Petition for Rehearing be and the same is hereby denied.

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida, this 5 day of January, 1972.

/s/ Thomas A. Testa

Circuit Judge

APPENDIX "C"

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A.D. 1972
MONDAY, MARCH 20, 1972

CASE NO. 72-156

THE ATHENEUM, INC.,

Petitioner,

vs.

THE CITY OF MIAMI BEACH,

Respondent.

This cause having heretofore been submitted to the Court on petition for writ of certiorari upon the transcript of record and briefs to review the order of the Circuit Court for Dade County in said cause bearing the date October 22, 1971, and the record having been considered, it is ordered that said petition be and the same is hereby denied. See: State v. Katz, Fla.App. 1959, 108 So.2d. 60; Robinson v. State, Fla. 1961, 132 So.2d. 3;5.

A True Copy

ATTEST:

WILLIAM P. CARTER
Clerk District Court of
Appeal, Third District

By: /s/ (signature unreadable)
Chief Deputy Clerk

cc: Joel Hirschhorn
Lionel Barnet
Thomas A. Testa
E. B. Leatherman

[TITLE OMITTED]

Counsel for petitioner having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

A True Copy

ATTEST:

s/ (signature unreadable)
Clerk District Court of
Appeal, Third District

cc: Joel Hirschhorn
Lionel Barnet

(FINAL ORDER IN THE ABOVE STYLED CAUSE HAS TODAY BEEN ISSUED AND MAILED TO THE CLERK OF THE CIRCUIT COURT IN AND FOR DADE COUNTY, FLORIDA)

APPENDIX "D"

SUPREME COURT OF FLORIDA

JANUARY TERM, A.D. 1974

THURSDAY, MAY 16, 1974

CASE NO. 42,330

DISTRICT COURT OF APPEAL,
THIRD DISTRICT

72-156

ATHENEUM BOOKSTORE, INC.,

Petitioner,

vs.

CITY OF MIAMI BEACH,

Respondent.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

ADKINS, C.J., BOYD, McCAIN, DEKLE and OVERTON, J.J., concur

Y

CC: Hon. W. P. Carter, Clerk
Hon. Richard Brinker, Clerk
Hon. Thomas A. Testa, Judge

Hon. Joel Hirschhorn
Hon. Joseph A. Wanick
(Hon. Basil E. Dalack

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

By: (signature unreadable)

Deputy Clerk

[TITLE OMITTED]

On consideration of the Petition for Rehearing filed by the attorney for the petitioner,

IT IS ORDERED by the Court that said petition be and the same is hereby denied.

ADKINS, C.J., BOYD, McCAIN, DEKLE and OVERTON, J.J., concur.

mr

cc: Hon. William P. Carter, Clerk
Hon. Richard P. Brinker, Clerk
Hon. Thomas A. Testa, Judge

Hon. Joel Hirschhorn
Hon. Joseph A. Wanick
(Hon. Basil E. Dalack)

A True Copy

TEST:

/s/ Sid J. White

Sid J. White
Clerk, Supreme Court

APPENDIX "E"

CONSTITUTION OF THE UNITED STATES AMENDMENT I

FREEDOM OF RELIGION, SPEECH AND PRESS: PEACEFUL ASSEMBLAGE: PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

CONSTITUTION OF THE UNITED STATES AMENDMENT IV

SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or arrirmation, and particularly describing the place to be searched, and the persons or things to be seized.

CONSTITUTION OF THE UNITED STATES AMENDMENT V

CAPITAL CRIMES: DOUBLE JEOPARDY: SELF-INCRIMINATION: DUE PROCESS: JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or in-

dictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTION OF THE UNITED STATES AMENDMENT VI

JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process of obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence

CONSTITUTION OF THE UNITED STATES AMENDMENT XIV, SECTION 1

CITIZENSHIP RIGHTS NOT TO BE ABRIDGED BY STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX "F"

FLORIDA SATUTUTE 847.011(8)(a) and (b) (1971)

(8) (a) The circuit court has jurisdiction to enjoin a threatened violation of this section upon complaint filed by the state attorney, county solicitor, county prosecuting attorney, or attorney for a municipality in the name of the state upon the relation of such state attorney, county solicitor, county prosecuting attorney, or attorney for a municipality.

(b) After the filing of such a complaint, the judge to whom it is presented may grant an order restraining the person complained of until final hearing or further order of the court. Whenever the relator state attorney, county solicitor, county prosecuting attorney, or attorney for a municipality shall request a judge of said court to set a hearing upon an application for such a restraining order, such judge shall set such hearing for a time within three days after the making of such request. No such order shall be made unless such judge shall be satisfied that sufficient notice of the application therefor has been given to the party restrained of the time when and place where the application for such restraining order is to be made, provided, however, that such notice shall be dispensed with when it is manifest to such judge from the sworn allegations of the complaint or the affidavit of the plaintiff or other competent person, that the apprehended

violation will be committed if an immediate remedy is not afforded.

APPENDIX "G"

CODE OF THE CITY OF MIAMI BEACH, FLORIDA

CHARTER, SECTION 14

It shall be the duty of the Municipal Judge to hold daily terms of Court in the City courtroom or other such place as may be designated by the City Council for the trial of all persons charged with violation of any ordinance of the City . . . and upon conviction impose upon him or them such penalties as may be provided by such ordinances . . . He shall have the power to summon witnesses, issue warrants for arrests upon affidavits duly filed, to administer oaths and do all other acts necessary for the performance of his duties. He shall have also power to punish for contempt . . .

APPENDIX "H"

FLORIDA CONSTITUTION, ARTICLE I, SECTION 4

FREEDOM OF SPEECH AND PRESS

Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated.

APPENDIX "I"

IN THE MUNICIPAL COURT IN AND FOR
THE CITY OF MIAMI BEACH, FLORIDA

CASE NO. (Judge Sweet)

CITY OF MIAMI BEACH, FLORIDA,

a municipal corporation,

Plaintiff,

vs.

ATHENEUM BOOK STORE, INC.,
a Florida corporation,
its officers, employees and agents

Defendants.

ORDER

An application has been made to the undersigned Judge by affidavit of a police officer of the City of Miami Beach, Florida, for an arrest and search and seizure warrants concerning the alleged promotion of, exhibition of, and sale of obscene books and magazines at the Atheneum Book Store, located at 1668 Collins Avenue, Miami Beach, Florida.

The affidavit, together with several magazines alleged to have been obtained from the aforesaid book store on May 14, 1971, appears sufficient for the issuance of an arrest warrant.

Because of the present uncertainty in the law concerning the seizure of a large number of publications without a prior adversary proceeding, the Court declines to issue a search and seizure warrant, but in lieu thereof, enters this Order setting forth a date and time on which it will hold an adversary proceeding in order to determine if such warrants should be issued upon a showing that the alleged promotion of, exhibition of, and sale of books and magazines provides the requisite probable cause that a violation of law has occurred and upon which basis the search and seizure, and arrest warrants may issue. It is therefore

ORDERED that the defendants be prepared to engage in an adversary hearing on the issue of the obscenity vel non of the books and magazines herein referred to, on the premises of the Atheneum Book Store, 1668 Collins Avenue, Miami Beach, Florida, on the 24 day of May, 1971, at 10:30 a.m. o'clock for the purpose of determining whether or not an Order of seizure shall issue and a warrant for arrest be served upon that person or those persons responsible for the promotion, exhibition and sale of the aforesaid materials.

DONE and ORDERED at Miami Beach, Dade County, Florida, this 20th day of May, 1971.

s/ Nelan Sweet

Municipal Judge

APPENDIX "J"

[TITLE OMITTED]

ORDER

An application was previously made to the undersigned Judge by affidavit of a police officer of the City of Miami Beach, Florida, for an arrest and search and seizure warrants concerning the alleged promotion of, exhibition of, and sale of obscene books and magazines at the Atheneum Book Store, located at 1668 Collins Avenue, Miami Beach, Florida.

The affidavit, together with several magazines alleged to have been obtained from the aforesaid book store on May 14, 1971, appeared sufficient for the issuance of an arrest warrant.

Because of the present uncertainty in the law concerning the seizure of a large number of publications without a prior adversary proceeding, the Court declined to issue a search and seizure warrant, but in lieu thereof, entered an Order setting forth a date and time on which it would hold an adversary proceeding in order to determine if such warrants should be issued upon a showing that the alleged promotion of, exhibition of, and sale of books and magazines provided the requisite probable cause that a violation of law had occurred and upon which basis the search and seizure, and arrest warrants might issue.

This Court, in its Order dated May 20, 1971, then ordered that defendants prepare to engage in an adversary hearing on the premises of the aforesaid book store. On

the date and time set by this Court for the aforesaid proceeding, counsel for the defendants presented the City's prosecutor with his verified petition for removal to the Federal District Court and Notice of Filing of a Bond pursuant to Title 28 SS 1442-1446 USCA.

Federal District Court Judge Clyde Atkins, in his Order Sua Sponte dated June 8, 1971, has remanded this cause to the jurisdiction of this Court, thereby denying defendant's petition for removal. It is therefore

ORDERED that the defendants be prepared to engage in an adversary hearing on the issue of the obscenity vel non of the books and magazines herein referred to, on the premises of the Atheneum Book Store, 1668 Collins Avenue, Miami Beach, Florida, on the 15th day of June, 1971, at 10:30 A.M. o'clock for the purpose of determining whether or not an Order of seizure shall issue and a warrant for arrest be served upon that person or those persons responsible for the promotion, exhibition and sale of the aforesaid materials.

DONE and ORDERED at Miami Beach, Dade County, Florida, this 9th day of June, 1971.

NELAN SWEET

Municipal Judge

APPENDIX "K"

[TITLE OMITTED]

NOTICE OF APPEAL

The Defendants ATHENEUM BOOK STORE, INC., a Florida corporation, its officers, employees and agents, appeal to the Circuit Court for the Eleventh Judicial Circuit in and for Dade County, Florida, from that certain Order entered by the Honorable Nelan Sweet on or about Tuesday, June 15, 1971, declaring all the written, printed and other materials located on the premises of the ATHENEUM BOOK STORE, 1668 Collins Avenue, Miami Beach, Florida, to be obscene and further directing the City of Miami Beach Police Department to seize all said materials in the above styled cause.

Dated at Miami, Dade County, Florida, this 18th day of June, 1971.

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Lionel Barnet, Esquire, Assistant City of Miami Beach Attorney, 1130 Washington Avenue, Miami Beach, Florida, this 18th day of June, 1971.

Respectfully submitted,

s Joel Hirschhorn

JOEL HIRSCHHORN
Attorney for Defendants
1040 City National Bank Building
25 West Flagler Street
Miami, Florida 33130
Telephone No. 358-5320

APPENDIX "L"

[TITLE OMITTED]

ORDER

THIS COURT having entered its Order of June 15, 1971, ordering the seizure of all materials located in the Atheneum Bookstore, 1668 Collins Avenue, Miami Beach, Florida, and further entering a Stay of Execution of the seizure for a period of ten (10) days from date of entry of that Order, and the Court having taken notice of the fact that more than ten (10) days has elapsed from the date of entry of the aforesaid Order, it is, therefore,

ORDERED AND ADJUDGED that the Order of Seizure of all the materials consisting of books and magazines which were viewed by the Court and described in those certain adversary proceedings which took place on June 15, 1971, on the premises of the Atheneum Bookstore, 1668 Collins Avenue, Miami Beach, Florida, and at which time the Court entered the Order of Seizure heretofore discussed, be and the same is executed, and the Police Department of the City of Miami Beach, by and through its Vice Control Unit, be and is hereby directed to effectuate the seizure upon the entry of this Order or as soon thereafter as practicable, and, it is further

ORDERED AND ADJUDGED that all materials seized pursuant to the authority contained in this Order shall be secured in an appropriate place of storage under the control of the Miami Beach Police Department pending the prosecution of The Atheneum, Inc., a Florida corporation, in future proceedings in this or any other Court

having jurisdiction of this cause and the aforesaid materials shall, upon appropriate Court Order, be delivered to the Court having jurisdiction to be dealt with as provided by law.

DONE AND ORDERED this 1st day of July, 1971, at Miami Beach, Dade County, Florida.

/s/ Nelan Sweet
JUDGE, MUNICIPAL COURT

ORDER TO BE SERVED UPON:

Captain Sistrunk
Miami Beach Police Department
Vice Control Unit

COPY OF ORDER TO:

Joel Hirschhorn, Esq.
1040 City National Bank Bldg
25 West Flagler Street
Miami, FL 33130

APPENDIX "M"

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA.

No. Crim. Appeal 7632 (Testa)

ATHENEUM BOOK STORE, INC., a Florida corporation, its officers, employees, and agents,

Appellants,

vs.

CITY OF MIAMI BEACH
a Florida municipal corporation,

Appellee,

ORDER DENYING MOTION TO SET ASIDE SEIZURE ORDER

THIS CAUSE having come on to be heard before me upon Appellants Motion to Set Aside Seizure Order and the Court having heard argument of counsel and being otherwise fully advised in the premises, it is thereupon

ORDERED and ADJUDGED

That said Motion be and the same is hereby denied.

DONE and ORDERED in Chambers, at Miami, Dade County, Florida, this 6 day of July, 1971.

s/ Thomas A. Testa

THOMAS A. TESTA,
CIRCUIT JUDGE

APPENDIX "N"

IN THE DISTRICT OCURT OF APPEAL
THIRD DISTRICT OF FLORIDA.

NO.

ATHENEUM BOOK STORE, INC.,
a Florida corporation, its officers, employees and agents,
Appellants,

vs.

CITY OF MIAMI BEACH,
a Florida municipal corporation,
Appellee.

EMERGENCY MOTION FOR CONSTITUTIONAL STAY WRIT OR IN THE ALTERNATIVE PETITION FOR WRIT OF CERTIORARI AND MEMORANDUM OF LAW IN SUPPORT THEREOF

COMES NOW ATHENEUM BOOK STORE, INC., and respectfully files this its Emergency Motion for Constitutional Stay Writ or In The Alternative Petition for Writ of Certiorari and Memorandum of Law In Support Thereof and would show as follows:

1. On May 20, 1971, Nelan Sweet, Municipal Judge in and for Appellee entered his Order requiring Appellants to be prepared to engage in an Adversary Hearing on the issue of obscenity vel non of the books and materials referred to on the Appellants' premises.

2. After various legal proceedings were held in State and Federal Courts including Application for Writ of Prohibition by Appellant to the Honorable William A. Herin which said Petition was denied, and which denial is presently on appeal to this Honorable Court, (District Court of Appeal, Case No. 71-639), that said Nelan Sweet on June 9, 1971, entered his Order directing the above describe Adversary Hearing to be held on June 15, 1971, at 10:30 o'clock a.m., and on said June 15, 1971, commencing at 10:45 o'clock a.m., and terminating at 10:58 o'clock a.m., the said Nelan Sweet in his capacity as Municipal Judge examined "representative magazine and other publications," located on said premises, and subsequently Ordered the seizure of all materials located on said premises being approximately 1400 magazines, books and other printed and written materials; said Nelan Sweet then entered a ten (10) day Stay of his Seizure Order during which time Appellant was given an opportunity to perfect its appeal, and on June 18, 1971, the undersigned counsel of record for ATHENEUM BOOK STORE, INC., filed its Notice of Appeal with the Clerk of the Municipal Court, in and for the City of Miami Beach, Florida, and on or about June 22, 1971, the City of Miami Beach, through its Assistant City Attorney, Lionel Barnet, filed its Motion to Strike portions of said Notice of Appeal, which said Motion has to date not been heard; that on or about June 24, 1971, ATHENEUM BOOK STORE, INC.'s Notion of Appeal was docketed in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, Criminal Appeal No. 7632 (Testa).

3. On July 1, 1971, Nelan Sweet in his capacity as Judge of the Municipal Court in and for the City of Miami Beach, Florida, entered its Order, a copy of which

is attached hereto, directing the Police Department of the City of Miami Beach, by and through its Vice Control Unit to seize all materials previously ordered to be seized "which were viewed by the Court and described in those certain adversary proceedings which took place on June 15, 1971," on the premises of the Appellant herein; upon being served with the above described and attached Order, counsel of record immediately applied to the Honorable Thomas Testa, in his capacity as Appellate Judge for an Order setting aside said Nelan Sweet's July 1, 1971, Order of Seizure, as may be seen by the attached Motion to Set Aside Seizure Order; and an emergency hearing was held on said Motion after which the Honorable Thomas Testa denied Appellants' Motion to Set Aside Seizure Order even though Appellants contended that the lower court was without jurisdiction to alter its previous Stay of Execution once an appeal had been as here perfected; and further attached hereto is a certified copy of Judge Testa's Order denying Appellant relief as described above.

4. That the City of Miami Beach through its Vice Control Unit is prepared to seize all materials located on Appellants' premises at approximately 7:00 o'clock p.m., the evening of Tuesday, July 6, 1971; that because the undersigned counsel of record was engaged in a complicated Federal conspiracy Jury Trial before the Honorable James L. King from Wednesday, June 30 until approximately midnight, Friday, July 2, 1971, the undersigned counsel for Appellants has been unable to properly arrange according to all formalities the necessary records before this Court, and further due to the fact that the weekend of July 3, 4, and 5 is a long holiday weekend, the undersigned has been required to dispense with normal formality in accordance with strict appellate and

procedural rules in an attempt to get this Emergency Matter before this Honorable Court for disposition, which is necessary because unless restrained by the entry of either a Constitutional Stay Writ, or an Order granting immediate Certiorari, to determine the substantative of issues herein, Appellant will be irreparably harmed and aggrieved, and substantially prejudiced, by the mass seizure of press materials which are protected by the First Amendment of the United States Constitution, and by case law developed there under, Marcus vs Search Warrants of Property, 367 U.S. 717 (1961), and A Quantity of Copies of Books vs State of Kansas, 378 U.S. 205 (1964), which require an adversary judicial inquiry which focuses on the alleged obscenity of each and every item prior to mass seizure, which was not done instanter.

5. Moreover the law is clear that when an appeal is perfected, the authority of the lawer court (i.e here the Municipal Judge), is terminated and it cannot further proceed as to the subject matter of the appeal. Thursby vs Stewart, 103 Fla. 990, 138 So. 742 (1931):

> When a notice of appeal has been timely filed, jurisdiction of the cause then rests absolutely in the Appellate Court until such appeal has been fully disposed of by offirmance, reversal, or dismissal; subject of course to mere temporary relinquishment of jurisdictoin for some specified exciptional purpose . . . General Capital Corporation vs Jel Service Co., 212 So.2d 369, 382 (Fla. 2nd Dist. 1968), aff'd 227 So.2d 667 (Fla. 1969).

6. Furthermore, a supersedeas is not essential to the acquisition of, or the preservation of, appellate juris-

diction, Thursby vs Stewart, supra, Willey vs W. J. Haggsan Corporation, 89 Fla. 446, 105 So. 126 (1925).

7. At the "adversary" hearing on Tuesday, June 15, 1971, the presiding Municipal Judge, Nelan Sweet, after spending thirteen minutes looking at a few magazines, ordered seizure of fourteen hundred publications. At that time the Judge gave the Appellant ten days within which "to appeal this without actually carting this (i.e. 1400 Books) all away," Notice of Appeal was filed on June 18, 1971, and at that time jurisdiction was then transferred to the Appellate Court, (i.e. Circuit Court, 11th Judicial Circuit in and for Dade County, Florida), Court and the Municipal Court no longer could proceed in this cause, Sunrise Beach, Inc. vs R. S. Phillips, 181 So.2d 169 (Fla. 2nd Dist. 1965), Seigel vs Solomon, 201 So.2d 501 (Fla. 3rd Dist. 1967), thus its Seizure Order of July 1, 1971, is void and of no effect, pending determination of the appeal.

8. It should be noted that the question of whether the Miami Beach Municipal Court cuold even hold the above described adversary hearing which resulted in the original Seizure Order of May 20, 1971, is presently on appeal to this Honorable Court (Case No. 710639). That appeal process was begun four days before the commencement of the supposed adversary hearing. Not only would the above cited law apply with respect to the lack of jurisdiction to hold the adversary hearing once the appeal process has been initiated, but to permit the ordered seizure would render moot the Prohibition Appeal (71-639, 3rd DCA0, because nothing could be accomplished by the issuance of the Writ. Wetherell vs Thursby, 100 Fla. 108, 129 So. 345 (1930), See also Jennings vs Fred-

erick, 137 Fla. 773, 189 So. 1 (1939), West Flagler Association Limited vs Board of Business Regulation, 238 So.2d 677 (Fla. 1st Dist 1970).

9. Finally Appellant-Petitioner would respectfully show that there are urgent constitutional question arising under the 1st, 4th, 5th, and 14th Amendments to the United States Constitution including the imposition of a prior restraint of expression, Bantam Books, Inc. vs Sullivan, 332 U.S. 58 (1963), the constitutionality of Chapter 847 F.S.A. and the City of Miami Beach Anti-Obscenity Ordinance, and finally freedom of espression, see New York Times vs U.S.A., and U.S.A. vs The Washington Post - U.S., (June 30, 1971).

WHEREFORE Appellant respectfully prays this Honorable Court grant Certiorari instanter, or issue its most Honorable Constitutional Stay Writ or the Seizure Order pending full and final appellate determination.

Respectfully submitted,

JOEL HIRSCHHORN
Attorney for Appellants

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Lionel Barnet, Assistant City Attorney, City of Miami Beach, 1130 Washington Avenue, Miami Beach, Florida, this 6th day of July, 1971.

JOEL HIRSCHHORN

[TITLE OMITTED]

Upon consideration of appellant's motion for constitutional stay writ or in the alternative petition for writ of certiorari, it is ordered that the motion for constitutional stay writ is denied and the alternative petition for writ of certiorari is dismissed for failure to make a prima facie case.

A True Copy

ATTEST:

/s/ William L. Bart

Clerk District Court of
Appeal, Third District

cc: Joel Hirschhorn
Lionel Barnet
Thomas A. Testa
E. B. Leatherman
/h

SUPREME COURT, U. S.

JAN 14 1975

in the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-438

ATHENEUM BOOKSTORE, INC., a Florida corporation, its officers, employees and agents,

Petitioner,

vs.

CITY OF MIAMI BEACH, a Florida municipal corporation,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LIONEL BARNET, ESQUIRE
Attorney for Respondent
420 Lincoln Road, Suite 244
Miami Beach, Florida 33139

Of Counsel:
JOSEPH A. WANICK, City Attorney
LEE H. SCHILLINGER, Assistant City Attorney
1130 Washington Avenue
Miami Beach, Florida 33139

MIAMI REVIEW — 371-4650 — 377-3721

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-438

ATHENEUM BOOKSTORE, INC., a Florida corporation, its officers, employees and agents,

Petitioner,

vs.

CITY OF MIAMI BEACH, a Florida municipal corporation,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, CITY OF MIAMI BEACH, herein files its answer in opposition to the Petition of the ATHENEUM BOOKSTORE, INC. for Writ of Certiorari to the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida.

JURISDICTION

Respondent wishes to supplement Petitioner's jurisdictional statement by bringing to the Court's attention that the matters involved in this cause below constitute an interlocutory appeal from a ruling made by the Miami Beach Municipal Court at an adversary hearing and that this appeal has stayed all further proceedings in the Miami Beach Municipal Court and, therefore, there is no final judgment or opinion of the Municipal Court. The only final judgment which has been rendered in this cause is from the State's lowest court of appellate jurisdiction.

Petitioner's jurisdictional statement in the Petition (Petition, page 2) shows on its face, that the Petitioner has improperly invoked the jurisdiction of this Court under 28 U.S.C. §1257.

AMPLIFICATION OF STATEMENT OF THE CASE

Respondent submits that the following material facts do not appear in Petitioner's Statement of the Case:

1. The adversary hearing conducted by the Miami Beach Municipal Court Judge, which was held on June 15, 1971, was preceded by an unsuccessful attack upon the authority of the Miami Beach Municipal Court to conduct such an adversary hearing, pursuant to the Municipal Court Order of May 20, 1971 (Appendix R-A). Immediately following this unsuccessful attack in both the State and Federal Courts, the Court entered its Order of June 9, 1971.

2. The Petitioner filed its Notice of Appeal of the Miami Beach Municipal Court's Order of June 15, 1971, six days after the entry of the contested order; however, Petitioner failed to perfect that appeal pursuant to Rules

3.5 and 3.6 of the Florida Appellate Rules, which require filing of Assignments of Error and Directions to the Clerk within ten (10) days after the Notice of Appeal has been filed.

3. On July 1, 1971, the Miami Beach Municipal Court enforced its Order of June 15, 1971 (Appendix R-B) and required that all materials located in the Petitioner's store be seized for the purpose of protecting the status quo, i.e., requiring the retention of evidence for the trial of the Petitioner on an appropriate trial docket.

4. The Petitioner thereafter filed its Amended Notice of Appeal on July 19, 1971 and perfected the same pursuant to the appropriate state rules. As a result of the ensuing Interlocutory Appeal in this cause, no trial docket has ever been entered in the Miami Beach Municipal Court pursuant to Section 14 of the Charter of the City of Miami Beach (Appendix R-C).

REASONS WHY THE CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

Point 1.

Petitioner has not proven any denial of its First, Fourth, Fifth, Sixth and Fourteenth Amendment rights. He further has failed to prove that the Municipal Court Judge acted without authority, although its Appendix cited only a portion of the enabling sections of the Charter of the City of Miami Beach which set forth the authority of the Municipal Court. Sections 14 and 14A of the Charter of the City of Miami Beach (Appendix R-C, D) clearly grant the Municipal Court the authority to perform all acts necessary in aid of its jurisdiction.

Point 2.

The Petitioner's expedited appeal from the Order of the Municipal Judge authorizing the seizure of material, which he declared to be of an obscene nature, was never perfected pursuant to the appropriate state court appellate rules. Therefore, upon the termination of the ten (10) day stay of the Judge's Order, seizure of the contested matter was both appropriate and necessary.

The books and magazines involved in this case were initially retained by the Petitioner, who made no effort to retain those specific materials which were involved at the hearing, although photographs were taken by the City for purposes of later identifying the material in question. The Petitioner's counsel stated at the close of the adversary hearing that the Petitioner intended to remain open for business and unless closed by court order, would sell any or all of the books and magazines which were the subject of the Judge's Order (Petitioner's Appendix A, p. 9). Therefore, since the Petitioner clarified its intent to defeat the status quo during the appeal and since the Petitioner's appeal was never properly perfected, the Municipal Court Judge acted in the only appropriate manner which was available, i.e., to seize the contested material and retain the same for purposes of trial of the Petitioner upon an appropriate trial docket, pursuant to Section 14 of the Charter of the City of Miami Beach (Appendix R-C) and Section 25-62.4 of Chapter 25 of the Code of the City of Miami Beach (Appendix R-E).

Point 3.

The Petitioner's First and Fourteenth Amendment rights were never violated by the Miami Beach Municipal Court. The facts clearly indicate that the Petitioner was provided an adversary hearing as soon as possible, in light of the Petitioner's fruitless attempts to obtain judicial restraint. The protection of Petitioner's rights which were provided by the Municipal Court met the requirements of the First and Fourteenth Amendments. The conclusion of the Municipal Court Judge that the Petitioner had engaged in pandering did not require any extraneous evidence, testimony, or proof of pandering when the Municipal Court Judge entered the Petitioner's premises in person and viewed the entire activity in which the Petitioner was engaging.

The argument below is in support of the above enumerated reasons why the cause should not be reviewed by this Court.

Petitioner's Brief obfuscates the procedure which the Municipal Court conducted in this cause. The Petitioner would have this Court believe that the Municipal Court's Order of seizure was based solely upon the May 20, 1971 hearing, however, such is not the case. At that hearing, the Municipal Court Judge was presented with an affidavit from Miami Beach Police Officers which indicated that there was probable cause for a search warrant to issue pursuant to Section 14A of the Charter of the City of Miami Beach (Appendix R-D). In fact, the Petitioner unsuccessfully contested the Order of the Municipal Court which required the Petitioner to prepare itself for an adversary hearing to be conducted on the premises of the

Petitioner's bookstore. The Municipal Court acted out of an overabundance of caution in order to protect the constitutional rights of the Petitioner.

The Order of the Municipal Court which the Petitioner is attacking in these proceedings was issued as a result of the adversary hearing which was, in fact, held on June 15, 1971 at the Petitioner's premises. Although the Petitioner was duly noticed of the adversary hearing, it failed to proffer any evidence or testimony to substantiate its contention that the material was not obscene. This void of evidence or testimony favorable to the Petitioner was created solely by the Petitioner. The Court never denied the Petitioner its right to present testimony or evidence. Petitioner states in its brief at page 5 that "The hearing which was held, in reality, constituted nothing more than an ex parte determination, after which the all the literature in Petitioner's store was declared as a matter of law." Such a statement is totally without basis in this case, where the Municipal Judge merely declared that there was probable cause to consider all the material exposed for sale to be obscene for purposes of seizure, for use as evidence at a subsequent trial. This procedure clearly falls within the requirements of law set forth by this Court in **Heller v. New York**, 413 U.S. 483 (1973), 93 S.Ct. 2789, where the Court relied upon its prior decisions in **United States v. Thirty seven Photographs**, 402 U.S. 363 (1971) and **Freedman v. Maryland**, 380 U.S. 51 (1965),

Petitioner has attempted to attack the Municipal Court's procedure based on authority of this Honorable Court which, in fact, authorizes that type of procedure. In **Heller, supra,** at 93 S.Ct. 2790, 2792, this Court reaffirmed the fact that it has never held or even implied

that there is an absolute First or Fourteenth Amendment right to a prior adversary hearing applicable to all cases where allegedly obscene material is seized pursuant to a warrant, albeit a judicial determination must occur promptly so that delay does not, in itself, become a form of censorship. In this cause, any delay between the seizure order and a final judicial determination by the Municipal Court was caused solely by the Petitioner's judicial attacks upon the adversary hearing and seizure order. Such delay cannot be considered a deprivation of Petitioner's rights. See **Heller v. New York, supra.**

The adversary hearing which was held on June 15, 1971 clearly provided Petitioner with an opportunity to be heard and to present any evidence it saw fit. The Petitioner's recollection of the events which occurred at that time clearly are not reflected by the record of the case. All of the books and magazines were identified by photographs taken at the time of the adversary hearing and although the names of the books were not read into the record, the photographs which clearly identified the material were retained by the Court as part of its record of the adversary hearing. This Court stated in **Paris Adult Theatre I v. Slaton,** 413 U.S. 49, 93 S.Ct. 2628, 2633 (1973), at the very outset of its opinion, that the Court does not undertake to tell the states what they must do, but rather to define the area in which they may chart their own course in dealing with obscene material. It is interesting to note that in **Paris, supra,** the state judge, like the Municipal Court judge here, merely viewed the material involved in the case. The only other state evidence was testimony by criminal investigators that they had paid admission to see the films.

Although the Municipal Court has been prevented by these appeals from holding a trial on the matters involved herein, the procedure followed by the Municipal Court at its adversary hearing of June 15, 1971, falls directly in line with the procedure of the Georgia court which was approved by this Honorable Court in **Paris, supra.** In this case, as in **Paris, supra,** the Petitioner's counsel attacks the decision of the Municipal Court Judge upon the lack of any evidence other than a direct viewing of the books and magazines as constituting a violation of the Petitioner's constitutionally protected rights. This Court has previously held in **Paris Adult Theater I v. Slaton, supra,** at 93 S.Ct., 2632, 2634, that it was not error "to fail to require expert affirmative evidence that the materials were obscene when the materials themselves were actually placed in evidence (citations omitted)." It is all to clear, also, that the Municipal Judge considered the allegedly obscene materials, by viewing same in the "context of the circumstances of sale, i.e., the setting in which the publications were being offered and were, in fact, presented to the public." Assuredly, the Municipal Judge could, and did, view the publications against "a background of commercial exploitation of erotica solely for the sale of their prurient appeal." A more classic example of the description Justice Brennan set forth in **Ginzburg v. United States,** 383 U.S. 463 (1966), would be rather difficult to find. Even if this case were "close," the undisputed evidence of pandering would prove the essential obscene nature of the materials in question, however, the photographic record, we contend, entirely supports the judicial finding absent a determination there was an over abundance of pandering on the part of the Petitioner, and which the record reveals undeniably.

Notwithstanding the position of this Court as set forth at the outset of its decision in **Paris, supra,** Petitioner proposes that the Miami Beach Municipal Court must follow guidelines for an adversary hearing which were formulated by a New York State Supreme Court, a court of similar jurisdiction to the Florida Circuit Court. In **Mitonas v. Schwalb,** 319 N.Y.S.2d 827 (1971), the New York Supreme Court, Special Term, attempted to provide guidelines to the Criminal Court of the City of New York, which is equivalent to the Municipal Court of the City of Miami Beach, wherein the lower court judge, after viewing the films, set the matter down for an "adversary hearing" where at the judge announced that once he had seen the films he would accept no testimony as to whether the picture in fact appealed to prurient interests or violated current community standards. No such case is presented herein.

The Petitioner has failed to cite to this Court any authority upon which a Writ of Certiorari should issue to the Circuit Court. Although the Petitioner likens this case to that of **Marcus v. Search Warrants of Property,** 367 U.S. 717 (1961), and **A Quantity of Books v. State of Kansas,** 378 U.S. 205 (1964), those cases have no applicability to the facts presented in this case. The Petitioner argues in its Brief at page 10, that this Court's holdings in **Quantity, supra,** and **Marcus, supra,** should have been applied by the Municipal Court.

In the present case, the Municipal Judge did not enter any order of seizure until he had personally viewed the entire premises involved. Rather than an ex parte judicial determination of several representative books which were reviewed in a "sterile atmosphere," the Municipal Judge

reviewed the books and magazines in light of the entire context in which the Petitioner presented the material to the public.

Petitioner also argues that the Municipal Court has no authority to rule upon the materials involved in this case pursuant to Florida Statute 847.01(8) (1973). That statute on its face granted the power of imposing the state obscenity statute solely within the jurisdiction of State Courts, thereby relieving Municipal Courts of any jurisdiction. This statute has been judicially limited, however, in **Leigh v. State ex rel. Kirkpatrick,** 298 So.2d 215 (Fla. 1st Dist. 1974) to apply solely to films. Since this case involves books and magazines, the Petitioner's argument that state law prohibits prosecution by the Respondent is inapplicable.

CONCLUSION

Respondent, CITY OF MIAMI BEACH, respectfully requests this Honorable Court to deny the Petition for Writ of Certiorari to the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, and affirm the judgment of that court and the Order of the Miami Beach Municipal Court, Miami Beach, Florida, for the reasons and authorities cited hereinabove.

Respectfully submitted,

/s/ Lionel Barnet

LIONEL BARNET, ESQUIRE
Attorney for Respondent
420 Lincoln Road, Suite 244
Miami Beach, Florida 33139

Of Counsel:
JOSEPH A. WANICK, City Attorney
LEE H. SCHILLINGER, Assistant City Attorney
1130 Washington Avenue
Miami Beach, Florida 33139

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI was mailed this ____ day of January, 1975, to Joel Hirschhorn, P.A., 1040 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130.

APPENDIX

APPENDIX "R-A"

IN THE MUNICIPAL COURT IN AND FOR
THE CITY OF MIAMI BEACH, FLORIDA

CITY OF MIAMI BEACH, FLORIDA
a municipal corporation,

Plaintiff,

vs.

ATHENEUM BOOK STORE, INC.
a Florida corporation,
its officers, employees and agents,

Defendants.

ORDER

An application has been made to the undersigned Judge by affidavit of a police officer of the City of Miami Beach, Florida, for an arrest and search and seizure warrants concerning the alleged promotion of, exhibition of, and sale of obscene books and magazines at the Atheneum Book Store, located at 1668 Collins Avenue, Miami Beach, Florida.

The affidavit, together with several magazines alleged to have been obtained from the aforesaid book store on May 14, 1971, appears sufficient for the issuance of an arrest warrant.

Because of the present uncertainty in the law concerning the seizure of a large number of publications without a prior adversary proceeding, the Court declines to issue a search and seizure warrant, but in lieu thereof,

enters this Order setting forth a date and time on which it will hold an adversary proceeding in order to determine if such warrants should be issued upon a showing that the alleged promotion of, exhibition of, and sale of books and magazines provides the requisite probable cause that a violation of law has occurred and upon which basis the search and seizure, and arrest warrants may issue. It is therefore

ORDERED that the defendants be prepared to engage in an adversary hearing on the issue of the obscenity vel non of the books and magazines herein referred to, on the premises of the Atheneum Book Store, 1668 Collins Avenue, Miami Beach, Florida, on the 24th day of May, 1971, at 10:30 o'clock A.M. for the purpose of determining whether or not an Order of seizure shall issue and a warrant for arrest be served upon that person or those persons responsible for the promotion, exhibition and sale of the aforesaid materials.

DONE and ORDERED at Miami Beach, Dade County, Florida, this 20th day of May, 1971.

/s/ Nelan Sweet

Municipal Judge

APPENDIX "R-B"

[TITLE OMITTED]

ORDER

THIS COURT having entered its Order of June 15, 1971, ordering the seizure of all materials located in the Atheneum Bookstore, 1668 Collins Avenue, Miami Beach, Florida, and further entering a Stay of Execution of the seizure for a period of ten (10) days from date of entry of that Order, and the Court having taken notice of the fact that more than ten (10) days has elapsed from the date of entry of the aforesaid Order, it is, therefore,

ORDERED AND ADJUDGED that the Order of Seizure of all the materials consisting of books and magazines which were viewed by the Court and described in those certain adversary proceedings which took place on June 15, 1971, on the premises of the Atheneum Bookstore, 1668 Collins Avenue, Miami Beach, Florida, and at which time the Court entered the Order of Seizure heretofore disclosed, be and the same is executed, and the Police Department of the City of Miami Beach, by and through its Vice Control Unit, be and is hereby directed to effectuate the seizure upon the entry of this Order or as soon thereafter as practicable, and, it is further

ORDERED AND ADJUDGED that all materials seized pursuant to the authority contained in this Order shall be secured in an appropriate place of storage under the control of the Miami Beach Police Department pending the prosecution of The Atheneum, Inc., a Florida corporation, in future proceedings in this or any other Court

having jurisdiction of this cause and the aforesaid materials shall, upon appropriate Court Order, be delivered to the Court having jurisdiction to be dealt with as provided by law.

DONE AND ORDERED this 1st day of July, 1971, at Miami Beach, Dade County, Florida.

/s/ Nelan Sweet

JUDGE, MUNICIPAL COURT

ORDER TO BE SERVED UPON:
Captain Sistrunk
Miami Beach Police Department
Vice Control Unit

COPY OF ORDER TO:
Joel Hirschhorn, Esq.
1040 City National Bank Bldg.
25 West Flagler Street
Miami, FL 33130

APPENDIX "R-C"

CHARTER OF THE CITY OF MIAMI BEACH, FLORIDA

Sec. 14. Powers and duties of municipal judge; associate judge; clerk of court.

It shall be the duty of the municipal judge to hold daily terms of court in the city courtroom or such place as may be designated by the city council for the trial of all persons charged with violation of any of the ordinances of the city, which trial shall be without jury, and upon conviction of such person or persons, to impose upon him or them, such penalty as may be provided by such ordinances; and a sworn or verified complaint shall not be necessary to give the municipal court jurisdiction of offenses triable in that court but the accused may be tried of the offense as docketed, provided such docket entry is sufficient to put the accused upon notice of the offense of which he is charged. He shall have the power to summons witnesses, issue warrants for arrest upon affidavit duly filed, to administer oaths and do all other acts necessary for the performance of his duties. He shall have also power to punish for contempt of court by a fine not exceeding fifty dollars or imprisonment not exceeding thirty days, or both. The costs of prosecution in said court shall be the same as are allowed by law in criminal courts of record being taxed against persons convicted, and collected by the city clerk, to be paid over by him to the city depository and placed to the credit of the police fund.

The city manager shall have the power to appoint by and with the consent of the city council, an associate municipal judge, who shall have all the powers and perform all the duties of the municipal judge in case of sickness, absence or disqualification of the municipal judge. The city clerk or duly authorized deputy shall act as clerk of the municipal court.

APPENDIX "R-D"

CHARTER OF THE CITY OF MIAMI BEACH, FLORIDA

Sec. 14(a). Search warrants.

The municipal judges shall have power to issue search warrants upon either of the following grounds:

1. When the property shall have been stolen or embezzled in violation of law.

2. When any property shall have been used:

(a) As a means to commit any misdemeanor, or

(b) In connection with gambling, gambling implements and appliances, or

3. When any property is being held or possessed:

(a) In violation of any of the laws prohibiting the manufacture, sale and transportation of intoxicating liquors;

(b) In violation of any of the laws or ordinances of the City of Miami Beach.

4. A search warrant cannot be issued except upon probable cause supported by affidavit or affidavits, naming or describing the person, place or thing to be searched and particularly describing the property or thing to be seized; no such warrant shall be issued in blank and any

such warrant shall be returned within ten days after issuance thereof.

5. The municipal judges, before issuing the warrants, must have the application of some person for said warrant duly sworn to and subscribed, and may receive further testimony from witnesses or supporting affidavits, or depositions in writing, to support the application. The affidavit and further proof, if same be had or required, must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.

6. The municipal judges, upon examination of the application and proofs submitted, if satisfied that probable cause exists for the issuing of the search warrant, shall thereupon issue a search warrant signed by him with his name and office, to any sheriff and his deputies or police officer or other person authorized by law to execute process, commanding the officer or person forthwith to search the property described in the warrant or the person named, for the property specified, and to bring the same before him.

7. The search warrant shall, in all cases, be served by any of the officers mentioned in his direction, but by no other person except in aid of the officer requiring it, said officer being present and acting in its execution.

8. The officer may break open any outer door, inner door or window of a house, or any part of a house or anything therein, to execute the warrant, if after due notice of his authority and purpose, he is refused admittance to said house or access to anything therein.

9. A search warrant issued under the provisions of this section may, if expressly authorized in such warrant by the judge issuing the same, be executed by being served either in the daytime or in the nighttime, as the exigencies of the occasion may demand or require.

10. All search warrants shall be issued in duplicate. The duplicate shall be delivered to the officer with the original warrant, and when the officer serves the warrant, he shall deliver a copy to the person named in the warrant, or in his absence to some person in charge of, or living on the premises.

When property is taken under the warrant the officer shall deliver to such person a written inventory of the property taken and receipt for same, specifying the same in detail, and if no person is found in possession of the premises where such property is found, shall leave the said receipt on the premises.

11. Upon the return of the warrant the officer shall attach thereto or thereon a true inventory of the property taken under the warrant, and at the foot of the inventory shall verify the same by affidavit taken before some officer authorized to administer oaths, or before the issuing officer, said verification to be to the following effect:

I, ..., the officer by whom the warrant was executed do swear that the above inventory contains a true and detailed account of all the property taken by me on said warrant.

12. The judge to whom the warrant is returned, upon the request of any claimant or any person from

whom said property is taken, or the officer who executed the search warrant, shall deliver to said applicant a true copy of the inventory of the property mentioned in the return on said warrant.

13. If it appears to the judge before whom the warrant is returned that the property or papers taken are not the same as described in the warrant, or that there is no probable cause for believing the existence of the grounds upon which the warrant was issued, the judge may order a return of the property taken.

14. Whoever shall knowingly and wilfully obstruct, resist or oppose any officer or person aiding such officer, in serving or attempting to serve or execute any search warrant, or shall assault, beat or wound any person or officer, or his deputies or assistants, knowing him to be such an officer, or person so authorized, shall be fined not more than five hundred dollars, or imprisoned for not more than sixty days.

15. Any person who maliciously and without probable cause procures a search warrant to be issued and executed shall be fined not more than five hundred dollars or imprisoned for not more than sixty days.

APPENDIX "R-E"

CODE OF THE CITY OF MIAMI BEACH, FLORIDA

Sec. 25-64.2. Obscenity.

(1) Declaration of policy. The city council deems it contrary to the public health, safety, welfare and morals to permit or allow the promotion of obscene material in the city.

(2) Definitions. As used in this section, the following words and terms shall have the following meanings:

(a) "Material" means anything tangible which is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound or in any other manner.

(b) "Obscene." Any material or performance is "obscene" if (a) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters and (c) it is utterly without redeeming social value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience.

(c) "Performance" means any play, motion picture, dance or other exhibition performed before an audience.

(d) "Promote" means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or to agree to do the same.

(3) Violations. It shall be unlawful and a person is guilty of obscenity when, knowing its content and character, he:

(a) Promotes, possesses with intention to promote any obscene material: or

(b) Produces, presents or directs an obscene performance or participates in a portion thereof which is obscene or which contributes to its obscenity.

(4) Presumptions.

(a) A person who promotes obscene material, or possesses the same with intent to promote it in the course of his business is presumed to do so with knowledge of its content and character.

(b) A person possessing five or more identical or similar obscene articles is presumed to possess them with intent to promote the same.

(5) Defense. In any prosecution for obscenity, it is an affirmative defense that the persons to whom allegedly obscene material was disseminated, or the audience to an allegedly obscene performance, consisted of persons or institutions having scientific, educational, governmental or other similar justification for possessing or viewing the same.

(6) Evidence; adjudication of obscenity. In any prosecution for obscenity, evidence shall be admissible to show:

(a) The character of the audience for which the material or performance was designed or to which it was directed;

(b) What the predominant appeal of the material would be for ordinary adults or any special audience to which it was directed, and what effect, if any, it would probably have on conduct of such people;

(c) Artistic, literary, scientific, educational or other merit of the material;

(d) The degree of public acceptance of the material;

(e) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material; and

(f) The good repute of the author, creator, publisher or other person from whom the material originated.

Expert testimony and testimony of the author, creator, publisher or other person from whom the material originated, relating to factors entering into the determination of the issue of obscenity, shall be admissible. The court shall dismiss a prosecution for obscenity if it is satisfied that the material is not obscene.

(7) Confiscation of prohibited material. Whenever anyone is convicted of violating this section, the court, in awarding sentence, shall make an order confiscating the obscene material and authorize and direct the chief of police to destroy the same.

(8) Minors under seventeen years of age. The provisions of this section shall be inapplicable and unenforceable to persons under seventeen years of age in order to comply with the 1969 Florida Statutes which have preempted this area by special legislation regarding such persons.